IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1945

Nos. 418 and 419

IN THE MATTER OF: NATIONAL AIRCRAFT CORPORATION, a Corporation, Debtor

JEROME F. DUGGAN, Trustee of the Estates of Christopher Engineering Company, a Corporation, and National Aircraft Corporation, a Corporation,

Petitioner,

vs.

JAMES C. SANSBERRY, Trustee of the Estate of National Aircraft Corporation, a Corporation,

Respondent.

NATIONAL AIRCRAFT CORPORATION, a Corporation,

Petitioner,

vs.

JAMES C. SANSBERRY, Trustee of the Estate of National Aircraft Corporation, a Corporation,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

Page

List of Authorities

SUMMARY OF ARGUMENT

As to the Facts. The petitioners have not presented to your Court the facts, evidence and pleadings that the Circuit Court of Appeals had before it. They, therefore, are not entitled to the requested writ 8

Binding Effect of Findings. There is definite finding of fact that National was not subsidiary by Referee, approved by District Judge and affirmed by Circuit Court of Appeals. The findings of a Referee, approved and affirmed by the District Judge, are binding upon the Circuit Court of Appeals, unless clearly erroneous. Cases are cited to this effect. There was no such clear error and the writ should not be granted 9

No Writ to Review Evidence. The Supreme Court does not grant certiorari to review evidence, but accepts concurrent finding of two Courts, unless clear error is shown. This was not, and writ should not be granted 9

Referee's Orders Are Res Judicata. The orders of the Indiana Referee as to restraining order, appointment of Receiver, of Trustee, order of sale, and that denying stay in the absence of review have the force and effect of judgments and are res judicata 10

Equitable Estoppel. The petitioners, by their course of conduct in the Indiana Court, should be regarded as estopped from preventing confirmation of sale of assets 10

As to Jurisdiction. The National Aircraft Corporation was held not to be a subsidiary of Christopher in Indiana proceeding, the Referee's finding and order being approved by the District Judge and affirmed by the Circuit Court of Appeals. The four sections of the Chandler Act, as to venue and jurisdiction, were

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STATEMENT

The statement presented by the petitioners is incomplete and inadequate. It will be apparent from the read-

ing of Judge Sparks' opinion (R. 91-100), that your Honorable Court does not have presented to it all of the facts that received the consideration of the Circuit Court of Appeals.

Counsel for petitioners make mention in their brief (page 6), that "On December 27, 1943, the Christopher Engineering Company, a Missouri corporation, filed in the Bankruptcy Court in Missouri and secured the approval of its debtor petition under Chapter X of the Chandler Act. (R. 92-100.)"

Their reference is to Judge Sparks' opinion. That petition is discussed in detail in the opinion of Judge Sparks. (Record pages 92, 3, 5.)

Since it may not be clear how, in the absence of the Christopher petition from the record, it was considered and discussed, together with other details of the Missouri case by the Circuit Court of Appeals, we explain that counsel for petitioners, in their brief for Appellants in the Court below, as addendum to their brief, filed a copy of the order approving the Christopher Debtor's petition. This opened the door to the respondent and gave him the opportunity to include in the brief for the Appellee, certified copies of the Christopher Engineering Company's Debtor petition, and of various other pleadings from the Christopher proceeding.

This explains Judge Sparks' statement that the Christopher's balance sheet annexed to its Debtor's petition "makes no mention of ownership or control of any stock of the National Company, although it purports to set forth a complete list of its assets and liabilities." (R. 95.)

This also accounts for Judge Sparks' discussion of the

Brown-Christopher resolution attached as an exhibit to the Christopher petition for reorganization, which was included as an exhibit in the brief of the respondent in the Court below. (R. 92-3.)

Prior to the Indiana bankruptcy proceeding, a State Court suit for receiver had been filed in Madison Circuit Court. A Receiver was appointed but did not qualify, because of a restraining order entered by the Missouri Court in the Christopher proceeding. (R. 16, 17.)

An involuntary petition in regular bankruptcy was filed on January 21, 1944, in the United States District Court for the Southern District of Indiana against National Aircraft Corporation, an Indiana corporation, whose principal place of business and all of its assets were located at Elwood, Indiana. (R. 7, 93.)

The appellant Duggan, as Trustee of Christopher (authorized by the Missouri Court, as shown by certified copy of pleadings attached to Respondent's brief below) retained Hubert Hickam, an Indianapolis attorney, who appeared before Referee Wilde in opposition to appointment of Receiver in Bankruptcy (R. 7). Hearing was had on this on January 25, 1944. Amended petition for restraining order in the Indiana Court was filed on January 27, 1944, and on February 1st, the Referee in the Indiana case entered a finding of fact and conclusions of law (R. 15-19), and restraining order thereon against the bankrupt and all other persons, from removing assets from the District. (R. 19-20.)

The findings of fact included a finding that no evidence was introduced showing that the Christopher Engineering Company, Debtor, was the owner of the capital stock of National and that, while Christopher Engineering Company was shown as a creditor of National, the Christopher

interests, including J. M. Brown, A. B. Christopher and Christopher Engineering Company, were indebted to the bankrupt in the net sum of $37,068.48 (R. 17).

No answer was filed to creditors' petition in bankruptcy in the Indiana case, and adjudication took place on February 7, 1944, without opposition. (R. 7.) On February 8th, Referee Wilde, appointed the respondent Receiver in Bankruptcy, notice being given to Mr. Hickam, attorney for petitioner Duggan, Christopher trustee, herein, and no petition for review being filed. (R. 8.)

Reverting to the opinion of Judge Sparks and the Missouri case, the opinion also reveals that on February 25, 1944, J. M. Brown, a stockholder and director of Christopher, and Secretary of National, filed verified petition in the Christopher case, alleging that he was the owner of 288½ shares of no par value of stock of National (R. 95); that this stock was pledged as collateral security for a loan of $6,000.00, to B. Sherman Landau, attorney for Brown, when the latter filed his National petition for reorganization in Missouri (R. 95-96). Landau filed a separate petition on the same date, alleging substantially the same facts. (R. 96.) The opinion also discloses that A. B. Christopher filed his petition on the same date in the Missouri proceeding, alleging his ownership of 288½ shares of National stock (R. 96).

Joseph M. Brown, Secretary-Treasurer of National, the bankrupt, attended first meeting of creditors in Indiana Court on March 7, 1944. He testified that he and Christopher purchased and owned the stock of National Aircraft Corporation and that he knew of no reason why the stock should be considered property of Christopher Company (R. 6). There is a finding of fact to that effect in the

Referee's certificate (R. 12), in the order of the Referee approving the sale (R. 35), and the testimony is also mentioned in the opinion of Judge Sparks (R. 97).

At this first meeting, Brown estimated the National liabilities at $429,000. The assets were given as $126,569.49 and he testified that it appeared to him the concern was insolvent. (R. 6-7.) Brown's testimony at the first meeting was given in the presence of Noah Weinstein and B. Sherman Landau, attorneys, in connection with the petition Brown filed for reorganization of National, and Attorney O'Neill of Anderson. No objection was presented to the election of a Trustee. (R. 7.) A draft of a plan to sell the assets to a new Indiana corporation, in which Brown would be the moving spirit, was submitted through the attorneys. The Referee pronounced this as unlawful, inequitable and offering no security to creditors. (R. 7.)

The respondent, as Trustee of National, filed petition for sale of the real and personal property of the bankrupt on March 21, 1944. Referee Wilde, in order to give all parties an opportunity to be heard, entered order for a meeting of creditors on April 4, 1944, for the purpose of considering this petition, directing that creditors and other parties in interest appear and show cause, if any they have, why the petition should not be granted and order of sale entered. Notices were sent to Duggan, Trustee for Christopher, and to Attorneys for Brown, Secretary-Treasurer of National. (R. 8, 25-26.) Neither Duggan nor Brown appeared and no objection was made to entering order of sale. (R. 8.) The order of sale was entered April 6, 1944, and provided for employment of auctioneer. Notice of the entering of this order was sent to all interested parties, including Duggan, Trustee, and Brown on April 10th. No petition for review was filed (R. 9, 28-32). Upon the

entry of the order of sale and employment of auctioneer, the respondent, as Trustee, and his Attorneys and the Auctioneer employed by him, and other persons who had been employed to help preserve and protect the property of the bankrupt, commenced intensive preparation for the sale, and very considerable expense was incurred in connection with lotting and parceling the personal property, advertising in newspapers in nine different cities, and printing and mailing 3,700 circulars sent to prospective purchasers by the auctioneer. (R. 9.)

The subsidiary petition in the name of National Aircraft was not filed in St. Louis until April 19, 1944, the day before the time fixed for sale, April 20th, and was not served until 9:30 A. M., at the very hour of the beginning of the sale. (R. 4.) As there were between 300 and 400 prospective purchasers present, the sale was conducted and the aggregate bids were in excess of $55,000, greatly in excess of the appraisement of $45,000, approximately $9,000, and $16,000 in excess of the value fixed by Brown. (R. 2-3, 10.)

Hearing upon the report of sale was set for April 25, 1944, and order entered requiring Duggan, Trustee of Christopher, Brown, and all other interested parties, to appear and show cause why the sale should not be approved, and copies of the same were sent to them. (R. 10-11, 36.)

Duggan and Brown did not appear and the hearing was continued until May 2nd (R. 11). On May 3rd, the order of sale was entered, no cause having been shown why said report of sale should not be approved and sales to high bidders confirmed. (R. 3.) The sales of the property were made in accordance with the orders of the Referee. (R. 13.)

Since the appointment of the Respondent, first as Receiver and then as Trustee, several thousand dollars have been expended in preserving the assets and property of the bankrupt, and in preparing the same for sale and in effecting the sale. (R. 13.)

Prior to the filing of petitions for review, no petitions or other pleadings had been filed in the Indiana case by Duggan, Trustee, or by Brown or the Christopher interests, or by the bankrupt. (R. 13.) The respondent, first as Receiver, then as Trustee, was in full and complete charge of the assets of the bankrupt since February 8, 1944, with no assertion of alleged rights of the petitioners until just before the sale. (R. 36.)

There was also included in the exhibits of certified copies of pleadings in the Christopher proceeding in Respondent's brief below, copy of Plan of Reorganization in Christopher case, filed on March 22, 1944, signed only by Brown as stockholder, and making no mention therein of National stock.

In addition to the pleadings included as exhibits in the brief below there was brought to the attention of that Court by a duly certified copy, proof of claim filed by Brown with the Referee in Indiana, the jurisdictional question being reserved. This had attached as Exhibit an assignment of 288½ shares of National stock by Christopher to Brown, dated April 1, 1944.

There is a definite finding of fact by the Indiana Referee that the capital stock of National was the property of Brown and Christopher and that National was not a subsidiary of Christopher (R. 12); also that National was insolvent. (R. 12.)

ARGUMENT

I

As to the Facts

We have set forth the facts as fully as we have, because we are of the opinion when they are completely known, your honorable Court will realize here is a situation, factually as well as legally, that does not entitle petitioners to the requested writ.

In the first place, they are not so entitled because they have not presented to your court all that the Seventh Circuit Court of Appeals had before it and properly took into account in rendition of its decision. (R. 92, 93, 95, 96, 97.) And as Judge Sparks states, they are "undisputed facts." (R. 92.)

In Indiana, on March 7, 1944, at the first meeting of creditors, Brown, Secretary-Treasurer of National swore that he and Christopher individually owned the stock of National and that he knew of no reason why the stock should be considered property of Christopher Company. (R. 6, 12, 35, 97.) Brown, Christopher and Landau, Brown's attorney, filed petitions to the same effect as to individual ownership in the Missouri Court on February 25, 1944. (R. 94, 95, 96.) This is not controverted in any particular until the allegation in the National reorganization petition on April 19, 1944. (One was true and one false or there was a change of ownership in the interim.)

There was a definite finding of fact as to the individual stock ownership and that National was not a subsidiary of Christopher. (R. 12, 35.) Southern District Judge Baltzell approved the finding and order of the Referee confirming sale on June 5, 1944. (R. 68.)

Binding Effect of Findings

The findings of a Referee, approved and affirmed by the District Judge, are binding upon the Circuit Court of Appeals, except in the event they are clearly erroneous.

In re Peoria Braumeister Co., 138 F. (2d) 520, 3, (C. C. A. 7th, 1943);
In re Wellin, 132 F. (2d) 262, 4 (C. C. A. 7th, 1942);
Brown v. Freedman, 125 F. (2d) 151 (C. C. A. 1st, 1942);
In re Newman, 94 F. (2d) 108, 111 (C. C. A. 6th, 1938);
In re Hoff, 101 F. (2d) 334 (C. C. A. 7th, 1939);
In re Rosenberg, 138 F. (2d) 409 (C. C. A. 7th, 1943);
Springman v. Gary State Bank, 124 F. (2d) 678 (C. C. A. 7th, 1941);
In re Penfield Distilling Co., 131 F. (2d) 694 (C. C. A. 6th, 1942);
General Order 47, 52(a), Rules of Civil Procedure.

No Writ to Review Evidence

This Court does not grant a certiorari to review evidence, but accepts the concurrent findings of two lower courts. (Here there were three courts, Referee, District, Circuit Court of Appeals.) The rule is thus stated:

> "On the questions of fact, both courts below decided against the petitioners. Under the well established rule, this court accepts the finding in which two courts concur, unless clear error is shown."
>
> Washington Securities Co. v. United States, 234 U. S. 76, 78;
> Texas & N. O. R. Co. v. Brotherhood Ry. & S. S. Clerks, 281 U. S. 548, 558;
> Virginia Ry. Co. v. System Fed., 300 U. S. 515, 542;

Capital Transportation Co. v. Cambria Steel Company, 249 U. S. 334, 5.

Such clear error has not been shown and does not exist. The Indiana Court had the right to determine the facts by the evidence. Even in the Missouri Court, individual ownership of stock had been asserted.

REFEREE'S ORDERS RES JUDICATA

As appears from the statement of the case, there was no review taken from the restraining order entered in the Indiana case on February 1, 1944, from the adjudication, from appointment of Receiver, from the appointment of Trustee or from the order of sale or denial of stay. (R. 13.)

The orders of the Referee in Bankruptcy, if not reviewed within the time and in the manner prescribed, have the force and effect of judgments and orders of the court and are res judicata.

In re Tinkoff, 85 F. (2d) 305, 7 (C. C. A. 7th, 1936), 32 Am. B. R. (ns) 45;

Clark v. Milens, 28 F. (2d) 457 (C. C. A. 9th, 1928), 13 Am. B. R. (ns) 19;

In re Sterling, 125 F. (2d) 104 (C. C. A. 9th, 1942), 48 Am. B. R. (ns) 468;

U. S. ex rel. Woods v. Mayer, 4 F. Supp. 653 (D. C. Wash., 1933), 24 Am. B. R. (ns) 98.

ESTOPPEL

The petitioners, and each of them, by their course of conduct in connection with the proceedings in the Indiana Court were estopped from preventing confirmation of sale of assets, pursuant to the order of that court.

In re Walton Hotel Co., 116 F. (2d) 110 (C. C. A. 7th, 1940);

Lebold v. Inland Steel Co., 125 F. (2d) 369 (C. C. A. 7th, 1941);

Augustus v. New Amsterdam Casualty Co., 100 F. (2d) 581, 7 (C. C. A. 7th, 1939);

Clark v. Milens, 28 F. (2d) 457, 13 Am. B. R. (ns) 19 (C. C. A. 9th, 1928);

Clinton Trust Co. v. John H. Elliott Leather Co., 132 F. (2d) 299, 304 (C. C. A. 2nd, 1942).

AS TO JURISDICTION

There is, in the first place, the question of fact whether National is a subsidiary of Christopher. Referee Wilde, passing on the question on the evidence heard by him, the only basis on which a Court can judge, has found it was not. (R. 12.) His finding and order were approved by the District Judge and affirmed by the Circuit Court of Appeals. Since it was not a subsidiary, the Missouri Court, in no event, would have jurisdiction over it and the expressions of the Circuit Judges that it must have been one earlier than April 19, 1944, are pertinent, in the absence of a showing contradicting the individual claims in that case and the testimony in Indiana.

The appropriate sections of the Chandler Act have been properly construed by Judge Sparks. The correct interpretation has been placed upon Section 129 of the Chandler Act (11 U. S. C. A. 529). It does not, in the event of pending bankruptcy, contemplate or permit the filing of ~~even~~ a genuine subsidiary's petition under Chapter X in a Court where the real parent corporation is undergoing reorganization. The Court where the regular bankruptcy proceeding is pending, is the sole tribunal for a subsidiary under such circumstances. A transfer can then be asked if deemed desirable and granted if the Court approves.

We hold no brief for the majority Judges below, personally, except as naturally we desire their view to prevail and be accepted by your honorable Court. But opposing counsel are undignified, if not offensive, when they say on page 27 of their brief that "one of the concurring Judges below tried to *make a play* (our italics) on the adjective 'original' in Section 129."

They ignore the fact that it is also used in Section 128.

As has been truly said by Judge Sparks of Sections 526-529, 11 U. S. C. A. "they should be construed together." (R. 98.) Reading them together, as shown in the note (R. 98) particularly if the Section divisions are ignored, the construction placed upon them by Judge Sparks' opinion is inescapable and inevitable.

Petition has been defined, as stated by opposing counsel, to mean a petition filed under Chapter X. (11 U. S. C. A. Sec. 506-5.) However, it also means "a document filed in a court of bankruptcy or with a clerk thereof, by a debtor praying for the benefits of this act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named." (Sec. 1 (24) Chandler Act.)

If, as suggested by opposing counsel, it meant a first or original petition under Chapter X, it would have said in Sec. 126 (11 U. S. C. A. 526) "file an original petition under this Chapter." That it did not do so is significant, as is also the non-inclusion of the word original in Section 127 (11 U. S. C. A. 527). The first petition under Chapter X, in the logic of the petition, would have been an original one.

Opposing counsel request approval of their doubtful attempt to construe the Sections. The Congressional intent is plain and their hangover reference is flippant. As

a matter of fact "original" is used as contrasted with action in a regular bankruptcy proceeding in 77b(a) of the Bankruptcy Act. They suggest the courts eliminate by construction what is a clear legislative intent.

Section 102 (11 U. S. C. A. 502) also contains the word "original", applying it to Section 128 (11 U. S. C. A. 528), namely, where no prior bankruptcy is pending.

Section 238 (11 U. S. C. A. 638) provides for an order contemplating the reinstatement and conduct of the regular bankruptcy proceeding, something that could only be properly done by the court in which the reorganization proceeding was pending.

We have found two cases considering the word "original" in its application to petitions for corporate reorganization.

These are

In re Paramount Publix Corporation, 85 F. (2d) 42 (C. C. A. 2nd, 1936);

Clark Brothers Co. v. Portex Oil Co., 113 F. (2d) 45, 7 (C. C. A. 9th, 1940).

In the case of,

In re Paramount Publix Corporation, 85 F. (2d) 42 (C. C. A. 2d, 1936),

Judge L. Hand considers the word "original" as applied to petition under 77-B. He says (on page 44):

> "Subdivision (a) of section 77B (11 U. S. C. A. sec. 207 (2)) provides for three situations: 'An original petition'; 'an answer' in bankruptcy before adjudication; 'a petition' before or after adjudication 'in any proceeding pending in bankruptcy.' Why the debtor should have the alternative of answer or petition before adjudication, or whether there is any but a nominal difference, we need not inquire. What is import

ant is that 'an original petition' is contrasted with a petition or answer in a 'proceeding pending in bankruptcy.' When either of these is so interposed, reorganization becomes an amplication or new end product of the original bankruptcy, just as though the bankrupt or the alleged bankrupt had proposed a composition, of which indeed reorganization is a variant and an outgrowth, and on the basis of which its constitutionality was upheld."

The word original, as applied to a petition under Chapter X, is also construed in the case of Clark Brothers Co. v. Portex Oil Company, 113 F. (2d) 45, 47 (C. C. A. 9th, 1940). Judge Mathews says:

"Original jurisdiction of proceedings under chapter 10 (sections 101-276) of the Bankruptcy Act is vested in courts of bankruptcy, including, of course, the district courts of the United States. The Oregon court, being a district court of the United States, is a court of bankruptcy.

A proceeding under Chapter 10 may be commenced (1) by filing a petition in a pending bankruptcy proceeding. (2) By filing an original petition. In this case, there was no pending bankruptcy proceeding. Hence, the debtor could and did file an original petition."

THE CLEAN HANDS DOCTRINE

Another reason why the writ should not be granted is that the petitioners have not come into Court throughout this case with clean hands. That is particularly true as to Brown, petitioner for National, and the Trustee stands in his shoes.

Courts of Bankruptcy are essentially Courts of equity and their proceedings inherently proceedings in equity.

Pepper v. Litton, 308 U. S. 295, 304.

It is elementary that one must come into a Court of equity with clean hands, something not true in the case of the petitioners.

Ford v. Buffalo Colliery Co., 122 F. (2) 555, 563, (C. C. A. 4th, 1941);

Keystone Driller Company v. General Excavator Company, 290 U. S. 240, 4.

Moreover, a litigant coming into a court of equity must keep his hands clean throughout the litigation.

American Insurance Co. v. Scheufler, 129 F. (2) 143, 8 (C. C. A. 8th, 1942).

CONSIDERATION OF QUESTIONS PRESENTED

A

Under this letter, petitioners state the question to be whether the order of the Missouri Court is res judicata on collateral attack or when questioned in the prior bankruptcy proceeding. The real situation was that they attacked the confirmation of sale and sought to assert the Missouri order as the basis for stopping the sale properly ordered by the Indiana Court. Such being the case, there was the right to pass upon the jurisdiction of the Missouri Court and finding there was none, approve the sale and affirm Referee and District Court.

The Circuit Court of Appeals has correctly held in this respect and there is no right to the requested writ.

We do not regard the cases counsel cite as showing that they are entitled to such consideration. We shall consider some of them in detail.

Under the discussion of question A, opposing counsel cite,

Chicot Co. Drainage Dist. v. Baxter State Bank, 308 U. S. 371, 84 L. Ed. 329.

The Court (Chief Justice Hughes) says in that case (p. 375): "We appropriately *confine* (our italics) our consideration to the question of res judicata as it now comes before us."

On the same page, it is stated:

> "The answer in the present suit alleged that the plaintiffs (respondents here) had notice of this proceeding and were parties, and the evidence was to the same effect, showing compliance with the statute in that respect. As parties, these bondholders had full opportunity to present any objections to the proceeding, not only as to its regularity, or the fairness of the proposed plan of readjustment, or the propriety of the terms of the decree, but also as to the validity of the statute under which the proceeding was brought and the plan put into effect. Apparently no question of validity was raised and the cause proceeded to decree on the assumption by all parties and the court itself that the statute was valid."

Need we remind the Court that the St. Louis proceeding was ex parte and without notice, and without final decree? The parties were not brought before them as in the Chicot case.

In the case of,

United States v. United States Fidelity & Guaranty Company, 309 U. S. 512, 84 L. Ed. 894,

Justice Reed, discussing the Chicot Drainage District v. Baxter State Bank case says (on p. 514):

> "In the Chicot County Drainage Dist. Case no inflexible rule as to collateral objection in general to judgments was declared. We explicitly limited our examination to the effect of a subsequent invalidation of the applicable jurisdictional statute upon an existing judgment in bankruptcy. To this extent the case definitely extended the area of adjudications that may

not be the subject of collateral attack. No examination was made of the susceptibility of such objection to numerous groups of judgments concerning status, extra-territorial action of courts, or strictly jurisdictional and quasi-jurisdictional facts."

In connection with the Chicot case, Stoll v. Gottlieb, 305 U. S. 165, is cited, but not quoted. In the latter case (on page 172), Mr. Justice Reed says:

"When an erroneous judgment, whether from the court of first instance or from the court of final resort, is pleaded in another court or another jurisdiction the question is whether the former judgment is res judicata. After a Federal Court has decided the question of the jurisdiction over the parties *as a contested issue*, the court in which the plea of res judicata is made has not the power to inquire again into that jurisdictional fact. We see no reason why a court, *in the absence of an allegation of fraud in obtaining the judgment*, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation. In this case the order upon the petition to vacate the confirmation settled the contest over jurisdiction. (Our italics.)

"Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. *After a party has his day in court, with opportunity to present his evidence and his view of the law*, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined."

There was no contested issue in the Missouri case, the respondent did not have his day in court and there are patent inferences and evidence of fraud in obtaining the order.

On the other hand, the petitioners had their day in the Indiana Court, have contested the issue, and the Indiana Court, having the same right to determine its jurisdiction, has decided against them in Referee and District Courts, now affirmed by Circuit Court of Appeals.

Petitioners' counsel have also cited,

Kalb v. Feuerstein, 308 U. S. 433, 84 L. Ed. 370, a conflict between state and Federal jurisdiction.

This case contains this very interesting statement respecting the Bankruptcy Law (p. 438):

> "It is generally true that a judgment by a court of competent jurisdiction bears a presumption of regularity and is not thereafter subject to collateral attack. But Congress, because its power over the subject of bankruptcy is plenary, may by specific bankruptcy legislation create an exception to that principle and render judicial acts taken with respect to the person or property of a debtor whom the bankruptcy law protects nullities and vulnerable collaterally."

The Chandler Act specifically provides in Section 148, 11 U. S. C. A. 549, that the jurisdiction under Chapter X is not conclusive until the order becomes final, something neither shown nor done.

In the case of,

Caterpillar Tractor Co. v. International Harvester Company, 120 F. (2d) 82,

also cited by opposing counsel under Question A, the court says, on page 84:

> "The general principle back of the rules of res judicata has received recent and clear statement by the Supreme Court. 'Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest.

and that matters once tried shall be considered forever settled as between the parties.' Baldwin v. Iowa State Traveling Men's Association (1931), 283 U. S. 522, 525, 51 S. Ct. 517, 518, 75 L. Ed. 1244. A litigant is to have his day in court, but only one day in court, against another."

The respondent, without notice, on ex parte hearing on the eve of the sale ordered by the Indiana Court, did not have his one day in the Missouri Court.

In quoting from Pen-Kan Gas & Oil Co. v. Gas Co. (C. C. A. 6th), 137 F. (2d), 871, 9, counsel did not include the preceding sentence which reads, "There is no principle of law better settled than that every act of a court of competent jurisdiction shall be presumed to have been rightly done *until the contrary clearly appears.*" (Our italics.)

That this clearly appears is manifest from the discussion of the Missouri case in Judge Spark's opinion. (R. 93-96.)

The case of In re Park Beach Hotel Bldg. Corporation, 96 F. (2d) 886, 891 cited by opposing counsel, deals with a prior state court receiver. It indicates there would have been no right to deal summarily with an adverse claimant. While a state court receiver could not be such, a Trustee in bankruptcy of a corporation with its stock owned by individuals, as decided in Indiana, not by the alleged parent corporation, is definitely an adverse claimant.

B

Under this letter, item 1, the question as presented by petitioners is, does the Court in which the regular bankruptcy proceeding is pending have the authority to entertain a collateral attack on the judgment and interpret jurisdiction of the other court, thereby denying full faith and credit? The real question again is, where the order of

the alleged reorganization proceeding is presented in opposition to approval of sale in the bankruptcy court, does not that court have the right to question and pass upon the jurisdiction of the other court?

As to point 2, the real question was whether the Court below had the right to determine from the record and extrinsic evidence, if need be, that the National was not a subsidiary, within the meaning of the Bankruptcy Act, at the essential time.

As to both, the Circuit Court of Appeals has determined correctly and there is no right to or need for the writ.

In support of their position, under question B, counsel for petitioners cite,

Milliken v. Meyer, 311 U. S. 457, 85 L. Ed. 278.

The opinion of Mr. Justice Douglas in that case contains the following expression:

> "Where a judgment rendered in one state is challenged in another, a want of jurisdiction over either the person or the subject matter is, of course, open to inquiry. Grover & B. Sewing Mach. Co. v. Radcliffe, 137 U. S. 287, 34 L. Ed. 670, 11 S. Ct. 92; Adam v. Saenger, 303 U. S. 59, 82 L. Ed. 649, 58 S. Ct. 454. But if the judgment on its face appears to be a 'record of a court of general jurisdiction, such jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence, or by the record itself.' Adam v. Saenger, supra (303) U. S. at p. 62, 82 L. Ed. 651, 58 S. Ct. 454."

That is precisely what the majority Judges did here. The want of jurisdiction over the person and subject matter was open to their inquiry and "by the record itself," they determined there was no jurisdiction.

C

The question presented under C, item 1, is whether a subsidiary can file a Chapter X proceeding in the pending parent proceeding after it is in regular bankruptcy in another District. This has been correctly answered by the Circuit Court of Appeals, construing the appropriate sections of the Chandler Act, as a whole. It cannot.

In point 2, under C, there is the question raised of automatic stay, while contending for an express one. Again the question of jurisdiction, factual and legal, determines and has been correctly decided by the Court below.

The case of Warder v. Brady, 115 F. (2d) 89 (C. C. A. 4th, 1940), cited on page 22 of petitioners' brief, under division C, is included with reference to comity. This deals, however, with a prior State Court receivership. There was no subsidiary involved and no conflict of jurisdiction of bankruptcy courts.

However, this case points out (page 93) that the power of the Judge to stay or enjoin is until final decree, hence temporary and makes mention of exercising "original jurisdiction."

A more important phase of this case, moreover, is the expression as to the necessity for plenary suits against an adverse claimant. The Court says (page 94):

> "It does not follow, however, that the jurisdiction of the bankruptcy court over suits against an adverse claimant may be summarily exercised. The statute does not so provide, and under the well established procedural rule of the ordinary bankrupty courts, as we have seen, suits by a trustee to recover property from an adverse claimant in possession must take the form of a plenary action. This is especially true when the title to property is in dispute."

National Aircraft Corporation, with its stock owned by individuals, is a very different corporation than one whose stock was owned by Christopher Company, is not a subsidiary, and respondent, as its trustee in bankruptcy, is an adverse claimant.

It is a matter of much surprise to us that opposing counsel have cited Williams v. North Carolina, which they say is not yet reported. This case is found in Vol. 89, No. 15 of U. S. Supreme Court Law. Ed. Advance Opinions, page 1123.

The opinion of Mr. Justice Frankfurter, mentioned by counsel, gives consideration to the "full faith and credit clause" of the Constitution and cases construing the same. Citing the case of Thompson v. Whitman, 18 Wall. (U. S.) 457, as considering the early case of Mills v. Duryee, 7 Cranch (U. S.) 481, it is said, "Thompson v. Whitman made it clear that the doctrine of Mills v. Duryee comes into operation only when, in the language of Kent, 'the jurisdiction of the court in another state is not impeached, either as to the subject matter or the person.' Only then is the record of the judgment entitled to full faith and credit."

On page 1126, the opinion states:

> "A judgment in one State is conclusive upon the merits in every other State, but only if the court of the first State had power to pass on the merits—had jurisdiction, that is, to render the judgment.
>
> "It is too late now to deny the right collaterally to impeach a decree of divorce made in another State, by proof that the court had no jurisdiction, even when the record purports to show jurisdiction. It was 'too late' more than forty years ago." * * *
>
> "It is one thing to reopen an issue that has been

> settled after appropriate opportunity to present their contentions has been afforded to all who had an interest in its adjudication. This applies also to jurisdictional questions. After a contest these cannot be relitigated as between the parties." Cases cited.
>
> "But those not parties to a litigation ought not to be foreclosed by the interested actions of others."

While it is true this case deals with the delicate subject of divorce and the public interest therein of the States, the social question of marriage and divorce is akin to the business question of bankruptcy and corporate reorganization and the matter of jurisdiction and domicile are important, too, in the business world in this connection.

The opposition have dealt much with the term "full faith and credit."

In the case of Cole v. Cunningham, 133 U. S. 107, 112, Chief Justice Fuller, after quoting these sections of the Constitution, said:

> "This does not prevent an inquiry into the jurisdiction of the court, in which a judgment is rendered, to pronounce the judgment nor in the right of the State to exercise authority over the parties or the subject matter, nor whether the judgment is founded in, and impeachable for, manifest fraud."

AS TO RES JUDICATA

We submit the following authorities as controverting the position of opposing counsel that the order of the Missouri Court was *res judicata* and could not be questioned by the Indiana Court and its action approved on review and appeal:

The rules of *res judicata* are not applicable where the judgment is not a final one.

Restatement of the Law of Judgments, Sec. 41, p. 161; Sec. 42, p. 164; See appendix;

Jos. T. Ryerson & Son, Inc. v. Bullard Machine Tool Co., 79 F. (2d) 192 (C. C. A. (2d) 1935);

G. & C. Merriam v. Saalfield, 241 U. S. 22, 60 L. Ed. 868, 872;

National Liberty Ins. Co. of America v. Police Jury, 96 F. (2d) 261, 3 (C. C. A 5th, 1938);

L. E. Waterman & Co. v. Modern Pen Co., 193 F. 242 (S. D. N. Y. 1912).

The order entered by the Missouri Court had not become final and was therefore not a conclusive determination as to jurisdiction.

Sec. 149 Chandler Act, 11 U. S. C. A. 549;

Sec. 161 Chandler Act, 11 U. S. C. A. 561;

Vol. 10, Remington on Bankruptcy, Sec. 4404.

An interlocutory decree is not *res judicata* between the same parties as to the same litigation, with questions left open until the final decree.

Individual Drinking Cup Co. v. Errett, 297 F. 733, 741 (C. C. A. 2nd, 1924);

Schaffran v. Mt. Vernon Woodbury Mills, 70 F. (2d) 963, 5 (C. C. A. 3rd, 1934);

Hunt v. Seeley, 115 F. (2d) 205 (C. C. A. 5th, 1940);

DeForest Radio Telephone & Telegraph Co. v. Westinghouse Elect. & Mfg. Co., 13 F. (2d) 1014, 6 (D. C. E. D. Pa., 1924).

A question does not become *res judicata* until it is settled by final and conclusive adjudication.

American National Insurance Co. v. Yee Lim Shee, 104 F. (2d) 688 (C. C. A. 9th, 1937).

A temporary restraining order is not a final determination, which renders the issue involved *res judicata*.

Santowsky v. McKey, 249 F. 51 (C. C. A. 7th, 1918);
Bohler v. Calloway, 267 U. S. 479 (1924), 69 L. Ed. 745, 749, 750.

A judgment is always subject to collateral attack when it is sought to be enforced, if the court rendering it did not have jurisdiction.

Nardi v. Poinsatte, 46 F. (2d) 347 (N. D. Ind., 1931);
Petition of Taffel (D. C. S. D. N. Y., 1941), 40 F. Supp. 709;
Restatement Law of Judgments, Sec. 11, p. 65, Sec. 12, p. 69, Sec. 5, p. 25.

In the case of,

Wright v. City National Bank & Trust Co., 104 F. (2d) 285, 7 (C. C. A. 6th, 1939),

the Court says:

> "The order confirming a plan of reorganization is not the equivalent of a judgment and is no more than a step in the administration of the debtor's estate and does not terminate the jurisdiction of the Court."

To the same effect, see,

In re Deep Rock Oil Corporation, 113 F. (2d) 266, 9 (C. C. A. 10th, 1940).

ORDER INTERLOCUTORY

That the restraining order was interlocutory and the Missouri order itself not final is clear from the cited provisions of the Chandler Act, such as Sec. 116 (4) (11 U. S. C. A. 516 (4); Sec. 149 (11 U. S. C. A. 549); Sec. 161 (11 U. S. C. A. 561); Sec. 137 (11 U. S. C. A. 537).

This is also set forth in Remington on Bankruptcy, Vol. 10, Sec. 4404. This recognized text writer says:

> "Section 149 of the Bankruptcy Act provides that 'an order which has become final, approving petition filed under this Chapter, shall be a conclusive determination of the jurisdiction of this court.'
>
> "The use of the word 'final' indicates that the *first* order of approval (under either Section 141, or Sections 142 and 143, 11 U. S. C. A. Sections 541 through 3), is to be considered interlocutory in its nature, until the expiration of the time prescribed by Section 137. (11 U. S. C. A. Sec. 537) for the filing of an answer (one or many) under Section 144."

Section 161 of the Chandler Act, 11 U. S. C. A., Section 561, provides:

> "Sec. 161. The judge shall fix a time of hearing, to be held not less than thirty days and not more than sixty days after the approval of the petition, of which hearing at least thirty days' notice shall be given by mail to the creditors, stockholders, indenture trustees, the Securities and Exchange Commission and such other persons as the judge may designate, and, if directed by the judge, by publication in such newspaper or newspapers of general circulation as the judge may designate."

There is no showing that this Section was complied with, and any notice given and subsequent hearing had. In the absence, therefore, of such acts and such showing the order did not become final, and therefore there was no conclusive determination of the jurisdiction of the Missouri Court, so that there is not the finality which would justify the application of the doctrine of *res judicata*, or objection on the score of collateral attack.

Petitioners' brief gives the final date for the Missouri Court's order as May 19, 1944. We do not know how this

is arrived at, as the necessary succeeding steps are not shown as having been taken. It is, however, concededly not final on May 3, 1944, when the Referee approved the sale, his action as of that date being subsequently affirmed by District Court and Circuit Court of Appeals.

INTERLOCUTORY INJUNCTION

The Rules of Civil Procedure, applicable to interlocutory injunctions, were not observed by the Missouri Court and, in that connection, we cite the following:

In granting, or refusing interlocutory injunctions, the court shall set forth findings of fact and conclusions of law.

Rule 52 (a), Rules of Civil Procedure;

Shannon v. Retail Clerks International Protective Association, 128 Fed. (2d) 553, 5 (C. C. A. 7th 1942);

Bowles v. Russell Packing Co., 140 F. (2d) 354, 5 (C. C. A. 7th, 1944);

Brown v. Quinlan, Inc., 138 F. (2d) 228, 9 (C. C. A. 7th, 1943);

Perry v. Baumann, 122 F. (2d) 409 (C. C. A. 9th, 1941).

Temporary injunction, or restraining order shall not issue without notice, unless it is shown by affidavit, or verified complaint, that immediate and irreparable loss will result, and the order must so provide and explain why granted without notice. Such order, unless renewed, expires within ten days.

Rules 65 (a), (b), (c) and (d), Rules of Civil Procedure;

Shannon v. Retail Clerks International Protective Association, 128 F. (2d) 553, 5 (C. C. A. 7th, 1942);

Southard & Co. Ltd. v. Salinger, 117 F. (2d) 194, 5 (C. C. A. 7th, 1941).